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IN THE

Supreme Court of the United States

October Term, 1963
No. 111

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SERVETTE, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR SERVETTE, INC., RESPONDENT.

Questions Presented.

1. Whether a labor union's inducing and encouraging supervisors, store managerial employees of retail chain markets, not to perform services for their employers or handle goods distributed by another employer with whom the union has a dispute violates Section 8(b)(4)(i) of the National Labor Relations Act.

2. Whether a labor unions's handbilling at neutral retail chain markets urging consumers not to purchase products produced by neutral producers and, in some instances, distributed by another employer with whom the union has a dispute, as part of the union's campaign to promote a boycott by dealers and consumers of such products, violates Section 8(b)(4)(ii) of the National Labor Relations Act.

Statute Involved.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*), are set forth in the Appendix, *infra*.

Statement of the Case.

Servette is a distributor of specialty merchandise in the area of Los Angeles, California [R. 4]. Kory's Markets, Inc., McDaniels Markets and Daylight Markets (hereinafter referred to as Kory's, McDaniels and Daylight) separately operate a substantial number of chain markets in the greater Los Angeles area [R. 71]. In early February 1960, as a result of a labor dispute with Servette, the Wholesale Delivery Drivers and Salesmen's Union, Local No. 848 engaged in a strike against Servette and picketed Servette's warehouse located in Los Angeles [R. 74-75]. From February 3 through March 10, 1960 the Union, in support of its strike against Servette, engaged in a campaign "to enlist the aid and cooperation of retail markets handling and stocking the products distributed by Servette in the [Union's] strike against Servette, and to promote a boycott by dealers and consumers" of said products [R. 75]. As part of this campaign, the Union sought to enlist the aid of Kory's, McDaniels and Daylight to cease doing business with Servette, its agents engaging in the following conduct and practices:

1. Told the store manager of McDaniels Market No. 14 that the Union had a labor dispute with Servette. Asked him to cooperate by not dealing with Servette and by taking Servette's merchandise off his shelves [R. 55-56]. Told him that if he failed to cooperate they would pass out handbills to customers [R. 55-57].

Handbills were passed out in front of the store but the manager continued his purchases from Servette. The handbills passed out at this market, as well as at other markets herein mentioned, read as follows [R. 84; 54-55]:

"To the Patrons of This Store

Wholesale Delivery Drivers & Salesmen's Local No. 848 urgently requests that you do not buy the following products distributed by Servette, Inc.:

* Brach's Candy
* Servette Candy
* Good Season Salad Dressing
* Old London Products

The Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual 'Yellow Dog' contracts.

These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

The drivers of Servette appreciate your cooperation in this fight."

2. Asked the store manager of McDaniels Market No. 18 to remove merchandise distributed by Servette from his shelves. The store manager told the Union representative that he, the manager, "would have to get permission" from his superior [R. 63-64]. At a meeting of the store managers of McDaniels, the managers were told by company officials "to try to get along with both sides and to do as they wished" [R. 63]. The manager of McDaniels Market No. 18 either re-

duced his purchases from or ceased doing business with Servette (*ibid.*).

3. Requested the store manager of McDaniels Market No. 25 not to handle Servette's merchandise. He replied, "I'll see what I can do". He was shown a copy of the handbill and thereafter either diminished or terminated his dealings with Servette [R. 63-64].

4. Requested the store manager of Daylight Market No. 3 to cooperate with them in their dispute with Servette by not handling Servette's products, and told him they were passing out handbills to customers of those markets which refused to cooperate [R. 57-58].

5. Told the store manager of Kory's Market No. 6 of the dispute with Servette, showed a copy of the handbill to him, and told him that the handbills would be passed out to his customers unless Kory ceased doing business with Servette. After the store manager said "he would have to check with the main office about getting Servette's merchandise out of the store," handbills were passed out to customers. The next week the manager refused to allow the Servette driver to stock his shelves. On two subsequent occasions, agents visited this market to ascertain whether or not Servette's merchandise was on display [R. 59-61].

6. Passed out handbills at Kory's Market No. 5 [R. 61-63].

7. Asked the store manager at Kory's Market No. 1 if he would cooperate by removing Servette's products from his shelves. The store manager said he would have to ask advice from his "supervisor". Handbilling occurred at this market on two different occasions [R. 64-65].

8. Passed out handbills to the customers of Kory's Market No. 2 and told the store manager that they would stop handbilling if he would cease handling Servette's products [R. 66-67].

9. Passed out handbills to customers of Kory's Market No. 3 [R. 69-70].

The Union's business agent testified that as part of the campaign against Servette the Union distributed these handbills at the customer entrances to well over 50 retail chain supermarkets in the greater Los Angeles area and the evidence here with respect to Daylight, McDaniels and Kory's covers only three of the chains where handbilling occurred [R. 76-78].

Handbilling occurred at certain of the markets above mentioned which purchased Good Season Salad Dressing and Old London Products not from Servette but from Certified Grocers of Southern California, another distributor not involved in the labor dispute existing between Servette and the Union [R. 55-56; 61-62; 65; 66-69].

Summary of Argument.

I.

A. Prior to the enactment of the Landrum-Griffin Amendment in 1959 to the National Labor-Management Relations Act, labor organizations were prohibited from inducing or encouraging "employees of any employer" to engage in "a strike or a refusal in the course of their employment to use, * * * or otherwise handle * * * any goods * * * or to perform any service," with an object of "forcing * * * any employer" to cease doing business with any other person. The legislative history of Section 8(b)(4)(i)-

(B) to the 1959 amendment showed the clear intention of Congress to close the recognized "loophole" that then existed in Section 8(b) (4) (A) of the Act. Because the language that existed in 8(b)(4)(A) applied only to "the employees of any employer", the prohibition contained therein did not cover the inducing or encouraging of certain individuals who are not technically "employees" within the statutory definition of the Act.

Particularly, as supervisorial or managerial employees are not "employees" within the definition of Section 2(11) of the Act, unions, prior to 1959, could, with impunity, induce the supervisors of a secondary employer to refuse to handle the goods of a primary employer with whom the union had a dispute. Congress considered the technical omission of supervisors as an illogical "loophole", and, accordingly, in enacting Section 8(b)(4)(i), deliberately substituted the phrase "any individual employed by any person". There can be no question, therefore, that store managers of retail food market chain stores are supervisors and clearly "individuals" within the meaning of Section 8(b)(4)(i) and, consequently, the union's activity to induce or encourage such individuals for the forbidden objects listed in Section 8(b)(4) is violative of the Act.

B. The Board, however, has sought to rewrite the Landrum-Griffin Act to conform to its own unique concept of congressional purpose. In seeking to justify its own theory, the Board has misread not only the clear language of the statute but the intention of Congress.

Contrary to Petitioner's assertions, there is no inconsistency between Sections 8(b)(4)(i) and 8(b)(4)(ii). The former provision prohibits a union from inducing and encouraging individuals employed by a corporation or a partnership or other person to engage in the enumerated activities. Essentially, Congress sought to prevent this kind of pressure from being brought upon anyone but sole proprietors, partners or corporate officers. Section 8(b)(4)(ii), on the other hand, is aimed at threats or coercion against those sole proprietors, partners and corporate officers who "as owners" of the enterprise are the persons excluded from Section 8(b)(4)(i). Reading the provisions in this fashion is not only in concert with the intent of and language utilized by Congress, but avoids the unwarranted assumption of law making authority on the part of the Petitioner.

C. Petitioner, undoubtedly cognizant of the obvious intent of Congress to include supervisors within the scope of the word "individual", has, with sleight-of-hand, shifted from the theory advanced by it in dismissing the instant complaint and in enunciating its position in prior Board cases. Now Petitioner's entire argument is premised on the alleged fact that these store managers had the authority, on their own and as part of their delegated duties, to decide whether to continue doing business with Servette. The uncontradicted facts in the record completely undermine this, the Board's new theory. The evidence is overwhelming to the effect that these store managers, when approached by the

union for these prohibited objectives, were without authority to make such decisions on their own, but instead they had to turn to their superiors or supervisors to determine what was to be done under the circumstances. Indeed, the evidence not only fails to support the Board's present position but completely contradicts it.

II.

A. In addition to arguing that an individual is not an individual, the Board further argues that a distributor is a producer of products. Like the Procrustean bed, if the traveler is too long you cut off his feet, if he is too short you stretch him a bit.

Congress, in enacting Section 8(b)(4)(ii) of the Act, sought to prevent secondary boycotts except in limited situations and then only with specific safeguards to innocent persons. The Petitioner admits that the union's handbilling in this case would otherwise violate Section 8(b)(4)(ii), but for the exception or second proviso to Section 8(b)(4). Both the prohibition and the exception, involving controversial legislation concerning secondary boycotts, are hedged and limited by carefully chosen words of art. And the exception clearly states that "publicity, other than picketing" is permitted if directed to show to the public that "a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer". The plain and simple fact is that the union here had no dispute against a producer of products, that Servette does not produce any

products but rather is a distributor of products. Had Congress sought to extend the protection of the proviso to the extent the Board urges rather than having limited it to situations where a product or products are produced by a primary employer and distributed by another, it would have used appropriate language to that effect. But instead, Congress chose to reject statutory language presented to it which would have extended the scope of the proviso to include distributors as well as producers. Furthermore, the class of employers covered by the exception proviso is further restricted by the additional statutory provision that the employer must be one who produces products capable of distribution. Certainly Servette does not fall into that definition.

There is involved in this case, therefore, no "unfair" product. Under the Board's unbridled interpretation of the language of the exception, the Union can do exactly what the Board admits the 1959 Amendment sought to prohibit: It can spread the labor dispute throughout the community by putting pressure upon neutral parties having nothing whatsoever to do with the Union's grievance.

B. The Union's handbilling fails to obtain the protection of the exception proviso for a further reason: A number of store managers in this case refused to continue business with Servette because of the handbilling. Consequently, a further express limitation to the exception proviso was violated. The Union admitted that it was engaged in a campaign to promote a boycott by

dealers and consumers of products distributed by Servette. To the extent it was successful in inducing store managers not to distribute, handle or resell goods distributed by Servette, the Union's activity not only was plainly violative of Section 8(b)(4)(ii) but cannot possibly be protected by the exception proviso.

C. For still another reason the Union's handbilling was outside the protection of the proviso to Section 8(b)(4). These handbills, which were passed out by union representatives in front of the various retail markets, stated that various named products were distributed by Servette. The evidence shows that at least some of those products were distributed to these stores by another distributor who had no connection whatsoever with the dispute between the Union and Servette. The public was, therefore, mislead into believing that Servette distributed all these products to these stores. The prerequisite in the proviso is that the publicity be "truthful". In this case the false and misleading statements by the Union injured an innocent party. It is clear that Congress sought to protect innocent and neutral parties and the Union's activity is, therefore, expressly excluded from protection of the proviso.

ARGUMENT.

I.

The Union's Efforts to Induce and Encourage Various Store Managers of Neutral Employers to Cease Handling Goods Distributed by Servette and to Refuse to Perform Services for Their Employers Is Plainly in Violation of Section 8(b)(4)(i)(B) of the Act.

A. The Plain Meaning of the Language of Section 8(b)-(4)(i)(B) Compels That Conclusion Reached by the Court Below; That Section Clearly Includes "Any Individual" and Does Not Exclude Supervisors or Similar Managerial Employees From Its Scope.

The upshot of Petitioner's contention is that the language "any individual employed by any person" in Section 8(b)(4)(i) of the Act does not apply to certain individuals. More specifically, the Board, based upon the rationale of its prior opinions interpreting 8(b)-(4)(i),[1] held in this case that certain so-called "high level" supervisory employees are not "individuals" and that therefore the inducing and encouraging by the union of various store managers of retail food market chain stores is not in violation of the Act. The Board presumably would declare that the same activity by the Union would be illegal if and to the extent it were

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[1]The Board in this case found no violation of 8(b)(4)(i) solely for the reasons set forth in *Local 505, International Brotherhood of Teamsters, etc. (Carolina Lumber Company)* 130 NLRB 1438 (1961) and *Upholsterers Frame & Bedding Workers, etc., (Minneapolis House Furnishings Co.)* 132 NLRB 40 (1961) [R. 37]. In those cases the Board held that Section 8(b)(4)(i) applies to the inducement of a low, but not high, level supervisor.

directed to so-called "low level" supervisorial or managerial employees. The crux of the Board's argument is, then, that Congress did not truly mean "any individual" when it used that term but rather meant to include only certain individuals; nor did it intend to include all supervisory employees, but only certain undefined types of supervisors. In so interpreting the phrase "any individual", the Board not only does violence to the plain meaning of that language but ignores both Congressional intent and fundamental precepts of statutory construction.

A statute is not always open to construction but only where the language used in the statute requires interpretation, that is, where the statute is ambiguous or will bear two or more constructions, or is of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning; there is no occasion for resorting to the rules of statutory interpretation, and the court will not look for or impose another meaning. In the absence of ambiguity, it is the established policy of courts to regard the statute as meaning what it says, and to avoid giving it any other construction than its words demand. See, generally, *Osaka Shosen Kaisha Line v. United States*, 300 U. S. 98 (1937); *Helvering v. New York Trust Co.*, 292 U. S. 455 (1934); *United States v. Hill*, 248 U. S. 420 (1919); and *Adams Express Co. v. Kentucky*, 238 U. S. 190 (1915).

Prior to the 1959 Amendment of the Act, Section 8(b)(4)(i) (then 8(b)(4)(A)) applied to "the employees of any employer". The 1959 Amendment

changed the language to read "*any individual employed by any person* engaged in commerce or in an industry affecting commerce" (emphasis added). It is apparent that the 1959 Amendment made a material and significant change in the language of that provision. In making material changes in the language of a statute, the legislature cannot be assumed to have regarded such changes as without significance but must be assumed to have had a reasonable motive. Where a statute is amended it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the legislature. On the contrary, the presumption is that every amendment of a statute is made to affect some purpose, and effect must be given the amended law in a manner consistent with the amendment. The general rule is that a change in phraseology raises a presumption and indicates persuasively that a departure from the old law was intended, and accordingly the amendment is generally construed to affect the change, particularly where the wording of the statute is radically different. *Creek County v. Sabler*, 318 U. S. 705 (1943); *Spring City Foundry Co. v. Commissioner*, 292 U. S. 182 (1934); *Bugajewitz v. Adams*, 228 U. S. 585 (1913).

B. The Legislative History of Section 8(b)(4)(i) Patently Shows That Congress Expressly Intended That Supervisors or Similar Managerial Employees Be Included Within the Language "Any Individual".

Buttressing the precise, unambiguous language of the 1959 Amendment is the clear and expressed intent of the Congress. That Congress sought to include supervisors such as the store managers involved in this case within the prohibition of Section 8(b)(4) was

made clear throughout the Congressional proceedings. Congressman Griffin, in explaining the provisions of the Landrum-Griffin Bill to Congress on July 27, 1959, gave a detailed analysis of the bill where he stated:[2]

> "Present law provides that it is unlawful for a union to induce or encourage 'employees of any employer' to engage in a strike or 'concerted refusal' to do their work for one of the forbidden objects listed in Section 8(b)(4)—such as to force their Employer to cease doing business with a 'primary employer.' Since farm laborers, railway labor and supervisors are not 'employees' within the meaning of the Act, unions may now, without penalty, induce them to engage in secondary boycotts. This bill corrects this by changing the word 'employees' in the phrase quoted above to 'any individual employed by any person.' This change appears in clause 4(i)."

Then Senator Kennedy, who as Chairman of the Conference Committee had a great deal to do with the interpretation of the legislation, submitted for the record an analysis of the legislation here involved on behalf of himself, Senators McNamara, Morse, and Randolph.

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[2]Legislative History of the Labor Management and Disclosure Act of 1959, Vol. II, pp. 1520-1523 (G.P.O. 1959). In 1962 Representative Griffin issued a statement regarding the National Labor Relations Board's emasculation of the Congressional intent in passing the 1959 Amendment:

"In short we clearly sought to prohibit a union from inducing 'any individual employed by any person' to engage in a secondary boycott. But now we find . . . the Labor Board literally deciding in recent decisions that in some circumstances an 'individual' is not 'individual'. Admittedly, this takes quite a bit of doing, but this the Labor Board has done . . ." 13 Labor Law Journal 355 (May, 1962).

There he stated, in an explanation of the proposed compromise of Title VII (under the heading "Secondary Boycotts and Hot Cargo"), "The proposal completely accepts the basic House position. Specifically the proposal would: 1. . . . 4. Prohibit secondary boycotts by supervisory employees."[3]

In explaining this change, then Senator Kennedy and Representative Thompson, his conference associate, submitted an analysis of the differences between the House and Senate bills before the Conference Committee with the following comment:[4]

> "In some industries supervisors belong to the union of the rank-and-file workers or as ex-members are sympathetic to it. Occasionally a union has induced the supervisors of a secondary employer to refuse to handle the goods of some primary employer with whom the union had a dispute. This conduct causes a true secondary boycott but it does not violate section 8(b)(4)(A) because section 8(b)(4)(A) forbids only the inducement of 'employers' and supervisors are not 'employers' within the statutory definition.
>
> "* * *
>
> "The House bill would extend the prohibition to inducement of supervisors. The present omission is an illogical loophole which should be closed if any legislation dealing with secondary boycotts is enacted. The substance of the House bill is therefore acceptable upon this issue."

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[3]II Leg. Hist. 1382-1383.

[4]105 Cong. Rec. 16589; II Leg. Hist. 1706-1707.

Senator Morse, one of the conferees on the part of the Senate, who spoke in favor of the conference bill's provision, stated:[5]

> "There are many instances also where a secondary boycott is conducted by a union agent going to a supervisor of employees, who often is a union member, and inducing him to shut off deliveries. Since the supervisor is subject to union discipline, such inducement would be clearly as effective as though inducement were applied to employees, themselves."

Senator Humphrey stated, as follows:[6]

> "[T]he amendment proposed by the Senator from Arizona [Mr. Goldwater] would change the words 'employees of any employer' to 'any individual employed by any person' and would delete the word 'concerted' * * *
>
> "As it now stands, section 8(b)(4) does not prohibit appeals or requests directed to supervisory or managerial employees because these individuals are not employees within the statutory definition. But they are surely individuals; and to substitute the word 'individual' for the word 'employees' would place requests and appeals to them within the prohibition of the law."

In the Senate Committee analysis of this change, it is stated:[7]

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[5] 105 Cong. Rec. 17882; II Leg. Hist. 1426.

[6] Remarks of Senator Humphrey on the Goldwater amendment, 105 Daily Cong. Rec. 5580, April 17, 1959, II Leg. Hist. 1037.

[7] Senate Committee Analysis, Committee print, Subcommittee on Labor and Public Welfare, United States Senate, 86th Congress, First Session, Sept. 10, 1959, I Leg. Hist. 965.

Similarly, Archibald Cox, Royal Professor of Law at Harvard Law School, wrote that the new provision "obviously"

> "The present law bans the inducement of employees of a secondary employer when the object thereof is to cease doing business with another employer. The revision includes the following features * * *. (2) Inducement of a single employee or a supervisor employed by a secondary employer is banned. * * *"

The store managers in this case are certainly supervisors within the meaning of the Act.[8]

The Board, however, by seeking to establish two categories of supervisors, not only creates a type of division that finds absolutely no support in the Act, the statute or its legislative history but further requires, as pointed out by the court below, that a different construction be given to the phrase "any person engaged in commerce" appearing in Section 8(b) (4) (i) than is accorded to the same phrase appearing in Section 8(b)(4)(ii). Even more seriously, however, the dubious theory advanced by the Board would make the enforcement of the prohibition unduly troublesome and confusing. Labor organizations, furthermore, would

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encompasses supervisors. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Re. 257, 270 (1959)

[8]Section 2(11) of the Act defines a supervisor as

"* * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

be placed in the untenable and precarious position of risking the commission of unfair labor practices without knowing which "supervisors" of an employer are "high level" and which are "low level", that is, which ones are individuals and which are not, which possess the undefined authority including them within Section 8(b)(4)(i) and which do not. Thus, a union, for example, may at one time urge that certain individuals are supervisors within the meaning of Section 2(11) of the Act for the purpose of a representation election but that these same individuals are not to be considered as supervisors for the purposes of an unfair labor practice though the definition of supervisor in Section 2(11) of the Act applies in both instances. It must be assumed that members of Congress were aware of that definition throughout the Congressional proceedings surrounding the 1959 Amendment and did not intend to create such an unrealistic dichotomy.

The Petitioner argues that only its interpretation of the word "individual" permits a reasonable construction of Section 8(b)(4). But the intent of Congress as expressed in Section 8(b)(4)(i) and (ii) is not rendered inconsistent by according the language of these provisions its plain meaning. It is clear that what Congress intended to do in Section 8(b)(4)(i) was to prohibit unions from inducing or encouraging individuals employed by a corporation or a partnership or other person to engage in the enumerated activities. Essentially, Congress sought to prevent this kind of

pressure from being brought upon anyone but sole proprietors, partners or corporate officers.[9] On the

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[9]It is submitted that Congress specifically intended to include "supervisors" within the definition of "individuals" employed by any person but probably intended to exclude corporate officers, who though technically employees, are actually thought of as "the employer". This position has been taken and spelled out in the Intermediate Report in *Upholsterers Frame & Bedding Workers, etc.* (Minneapolis House Furnishing Co.) 132 NLRB 40, 66 (1961), which states:

> "While most, but not all corporate officers are 'supervisors' as the term is defined in Section 2(11) of the Act, there is, in customary parlance, a distinction between a supervisor and a corporate officer. A supervisor is an agent of management and in that sense is management but a corporate officer is management or top management or the employer even without thinking in terms of agency. It is our opinion that Congress did not intend 'individual' in subparagraph (i) to include corporate officers. From time to time, as we have seen from the legislative history cited herein, Congress referred to and used the term 'the employer' or "the secondary employer' and made it clear that the prohibition or threats, coercion, and restraint was primarily intended to protect 'the employer' from such direct approach. This was true although employers obviously operated through policymaking officials and, except for proprietors and partners, the top officials or corporate officers, were the one whose policy was affected by threats, coercion and restraint. But, with respect to inducement under subparagraph (i), it is our opinion that Congress did not envisage or seek to prohibit inducement or encouragement, short of threats and coercion (otherwise taken care of) of the employer, including corporate officers. The basic loyalty of the employer and its officers to its ideals and economic interest in continuing a satisfactory business relationship with another employer was presumed. The discussion in Congress was confined to situations where, through threats and coercion, the secondary employer was forced to sever his business relationship with another employer. The remaining danger to the secondary employer was that through calling a strike of his employees or inducing them not to work the union might accomplish its purpose. This was original Taft-Hartley concept. The amendments proceeded on basically the same premise, except that it was believed that a much wider variety of employees as well as single employees and 'supervisors' should be insulated from inducement. Supervisors, below the corporate officer level, were, at least in some cases, believed to be susceptible to inducement, either because they were generally closer to

other hand, it is reasonably clear that Section 8(b)(4)(ii) is aimed at threats or coercion against those sole proprietors, partners and corporate officers who as "owners" of the enterprise are the persons excluded from Section 8(b)(4)(i). It certainly does no mischief to the statute to interpret its provisions in this fashion and obviously is in concert with the intent of and the language utilized by the Congress.

C. Contrary to Petitioner's Assertion the Store Managers Did Not Have the Authority to Determine Whether or Not to Continue Doing Business With Servette.

Obviously aware that both the language and intent of Congress are contrary to the theory advanced by the Board in dismissing the instant complaint and in enunciating its position in *Carolina Lumber* and *Min-*

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employees or might hold union cards or entertain some degree of union sympathy in a particular factual situation. In any event, they were not in the same position as the employer himself, i.e., the corporate officers, who would yield presumably only when threats or coercion were brought to bear.

In further support of the foregoing conclusions, it is to be noted that the original Taft-Hartley language, aside from the substitution of 'individual' for 'employees' was retained and this language was peculiarly pertinent to employees and employee action and to those below the corporate officer level even under the amendment. Subparagraph (i) speaks in the same context, of engaging in a strike or inducing or encouraging individuals to engage in a strike or refusal to work. We are not persnaded that the foregoing is the type of conduct reasonably expected to be directed to corporate officers or that a union expects that corporate officers can be so induced. Supervisors, below the officer level, however, as we have explained, have at least the potential, even if remote and probably varying with their level of supervision, of being thus induced. In any event, we are convinced from both the term 'individual employed' and from specific references to supervisors and their inducement as stated by Members of Congress, that supervisors below the officer level are included in the term 'individual'."

neapolis House Furnishing Co., supra, the Board now attempts to abandon that rationale and instead to assert that the appeals to the store managers were not prohibited by Section 8(b)(4)(i) because these supervisors allegedly had the authority, solely, on their own, and as part of their delegated duties, to decide whether to continue doing business with Servette (NLRB Brief, pp. 2, 8, 13-26). It is quite apparent that Petitioner's entire argument must now either rest or fall on this allegation. The undisputed facts in evidence, however, show beyond contention that none of the store managers had any such delegated duty or authority. *Indeed, the uncontradicted evidence is all to the contrary:* At the time the Union sought to induce them not to handle goods distributed by Servette or to perform services in connection therewith, none of the store managers, on his own, could effectively make the policy decisions as to whether to continue doing business with Servette or other distributors; nor did any of them formulate the purchasing or selling policies of their employers.

Some of these store managers gave uncontradicted evidence that they had to seek advice from their superiors when approached by the Union agents. When the store manager at Kory's Market No. 6, was approached by two representatives from the Teamsters No. 848 and told not to handle Servette-distributed merchandise, he stated that he "would have to check with the main office about getting Servette merchandise out of the store" [R. 59]. The manager of McDaniels Market No. 18, testified that when three Teamster representatives approached him and asked him to take Servette merchandise off the shelves, he said that he

would have to get permission from his superiors [R. 63].[10] The manager of Kory's Market No. 1, stated, when similarly requested to take Servette merchandise off the shelves, "I will check with my supervisor" [R. 65]. Obviously, in light of this record, the argument of the Board in this regard is totally unwarranted and untenable.

It is apparent, therefore, that as a matter of law these store managers are supervisors within the meaning of the Act and therefore are included within the term "any individual" in Section 8(b)(4)(i); and as a matter of fact, there is no evidence that at the time the union representatives violated Section 8(b)(4)(i) these store managers had any authority "to select the sources of goods bought for resale" or to decide whether to continue to handle goods distributed by Servette. The subtle change in the Board's theory from that advanced by it in dismissing the complaint can be of no avail. The undisputed facts are clearly contrary to the Board's present position.[11]

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[10]The evidence shows that this manager, in response to the union representatives' appeals to him to take Servette merchandise off the shelves, told them that he would have to get permission. *Thereafter*, "at a meeting of managers of some kind they [the store managers] were told by company officials to try to get along with both sides and do as they wished". [R. 63]. This is the only "evidence" that would indicate any store manager had any "authority" of the kind attributed to him by the Board. The *most* this testimony shows, however, is that at the time the Union representatives appealed to that manager he had *no* authority whatsoever and had to ascertain what to do in this regard from his superiors.

[11]Even by the Board's standards the burden of proof in a Section 8(b)(4) situation as to whether a supervisor is not an individual within the meaning of that provision is on the party urging this escape route. In the instant case the union utterly failed to present a single fact which would sustain its burden that the store managers referred to above were not individuals within even the Board's definition of that term. The

II.

The Labor Board Improperly Failed to Find That the Union Violated Section 8(b)(4)(ii)(B) of the Act by Falsely Handbilling Various Stores Doing Business With Servette.

A. The Publicity Proviso to Section 8(b)(4) Does Not Protect the Handbilling on the Part of the Union as Against Servette, a Distributor.

The Board in its Decision and Order recognized and in its brief concedes the Union's handbilling constituted restraint and coercion by the terms of Section 8(b)(4)(ii)(B) of the Act, but, relying upon its prior reasoning in *International Brotherhood of Teamsters, Local 537 (Lohman Sales Co.)*, 132 NLRB 901 (1961), held that such handbilling was protected by the exception proviso to Section 8(b)(4) of the Act [R. 38].

The proviso to Section 8(b)(4) does not protect the handbilling of the Union in this case.[12] That proviso states:

Board has held in *Local 560, International Brotherhood of Teamsters*, 127 NLRB 1327 (1960):

> "As we stated in *Detroit Edison*, once the General Counsel has established that persons employed by a third-party employer have been induced or encouraged for unlawful objects, it rests upon the respondent to produce evidence that these individuals were supervisors and not employees. Only if such evidence is produced is the specific inducement removed from the interdiction of the Act. The Respondents in the instant case have failed to produce such evidence."

The rule as set forth in the above case, though involving former Section 8(b)(4)(A), is equally applicable in the instant situation, and the Board should not be allowed initially to engraft an exception to the all-inclusive word "individual" and then, blithely, ignore that exception.

[12]The parties have assumed that handbilling in front of the retail stores was not "picketing" within the meaning of the proviso. There is considerable authority, however, to the effect that handbilling at a *locus in quo* is picketing. See Restatement of Torts, Sec. 779, Comments f through i; *Kitty Kelly Shoe*

"That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of *truthfully* advising the public, including consumers and members of a labor organization, that *a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer,* as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." (Emphasis added.)

As the dissenting member of the Board noted, that proviso "contemplates, at most, the protection of handbilling of a secondary distributor in furtherance of a dispute with a primary employer who produces a product. And the bare and simple fact is that Servette does not produce any products." [R. 38].

Had Congress sought to extend the protection of the proviso to the extent that the Board urges rather than limiting its scope to situations where a *product* or *prod-*

Corp. v. Retail Employers, 125 N.J. Eq. 250, 5 A. 2d 682, 684 (1939); *Mason and Dixon Lines v. Odom*, 193 Ga. 471, 18 S.E. 2d 841, 844 (1942). Cf. *Teamsters Local 695 v. Vogt*, 254 U. S. 284, 289 (1957); *Business Service Employees v. Gazzam*, 339 U. S. 532, 537 (1950). If handbilling in these circumstances is properly to be considered as picketing, then, of course, the exception proviso to 8(b)(4) would not be applicable in any situation where handbilling was conducted at the situs of the secondary employer, as in this case. See also *Burr & Perfection Mattress & Spring Company v. NLRB*, 321 F. 2d 612, 621-22, (5th Cir. 1963).

ucts are *produced* by a primary employer and *distributed* by another employer, it would have used appropriate language to that effect. But in light of the fact that throughout Section 8(b)(4) and in the proviso itself Congress carefully used such terms as "services", "distribute", "distribution", "products", "producer", "processer", "manufacturer", and "transport", it is obvious that it meant to limit the scope of the exception proviso to Section 8(b)(4).[13]

That proviso is an exception to the basic and general rule that Congress considered paramount, that is, to prevent this type of secondary boycott. The exception should, therefore, be strictly construed. *Spokane & Inland Empire R. Co. v. United States*, 241 U. S. 344, 350 (1916); *Piedmont & N. R. Co. v. I.C.C.*, 286 U. S. 299, 312 (1932); *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 638 (1944). The legislative history of this provision reinforces that sound rule of law.[14]

The broad scope of coverage of the proviso which the Board is urging was actually presented to but not

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[13]Representative Thompson (who along with then Senator Kennedy was one of the principal drafters of the final version of the 1959 legislation) has stated that since those matters legislating secondary boycotts are controversial; such language adopted "is hedged and limited by carefully chosen words of art." 108 Daily Cong. Rec. 9717 (June 5, 1962.)

[14]The Congressional intent in this regard is further evidenced by a recent statement of Congressman Griffin on the proviso to 8(b)(4):

> "The proviso states a *very limited exception* to a general rule. That exception, which is spelled out precisely in the proviso, provides that *where the primary employer is the producer of a product, and that product is distributed by another*—or secondary—employer, the union may truthfully publicize the fact by means other than picketing, so long as the publicity does not affect the performance of services at the establishment of the secondary employer." 13 Labor Law Journal 355 (May, 1962) (Emphasis added).

accepted by the Congress. At the time the Senate and House Conferees were attempting to resolve the differences between their respective bills, the then Senator Kennedy introduced to, and had placed upon the calendar of, the Senate a resolution which instructed the Senate Conferees to insist upon the inclusion of certain provisions in the conference agreement. Included in the provisions dealing with the amendments to Section 8(b)(4) was the following proviso:[15]

> "Provided, That nothing contained in this subsection (b) shall be construed * * * to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operated, *or goods are produced or distributed* by an employer engaged in a labor dispute. * * * (Emphasis added)."

The Board in its Brief (p. 35) could see no significance in the fact that the above language was presented to but not adopted by the conference committee. It is submitted that the fact that Congress selected the *restrictive* language that it did rather than the more inclusive language which was presented by the Senate conferees is certainly significant and exemplifies congressional intent.[16]

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[15]105 Cong. Rec. 15906 August 28, 1959), II Legis. Hist. 1383, Col. 1; 105 Cong. Rec. 16416 (September 3, 1959); II Legis. Hist. 1434.

[16]Compare *Border Pipe Line Co. v. Federal Power Commission* 171 F. 2d 149, 152 (D.C. Cir. 1948) where the Federal Power Commission asked the court "to read the statutory definition as though it contained the phrase originally included but later eliminated by Congress in the legislative course of the Act." The court refused, stating, "This we cannot do. We cannot write into an act of Congress a provision which Congress affirmatively omitted." See also *United States v. Atchison T. & S. F. Ry. Co.*, 220 U. S. 37, 44-45 (1910).

The Board's argument mentions only two of the three critical words in the proviso (NLRB Brief, pp. 27-28). The Board ignores the statutory requirement that the proviso apply only to "products", "produced" by Servette *and* "distributed" by another employer. In glossing over the actual language of the proviso, the Petitioner attempts to create an ambiguity where none exists. As the court below noted in *Great Western Broadcasting Corp. v. NLRB*, 310 F. 2d 591, 600 (9th Cir. 1962), the proviso refers only to "those who produce a product or products. This class of employers is further defined and restricted by the additional provision that the employer must be one who produces products capable of distribution". Patently, the wholesaling activities of Servette produced nothing capable of distribution.

Congress undoubtedly considered it proper to permit unions to "follow the product" so as to inform the public that a producer of a product is allegedly failing in some way to meet the standards, requirements or desires of the union with regard to that product. Petitioner recognizes this concept, though in a distorted form (NLRB Brief, pp. 31-34). The fact is that the Union in this case did not follow "unfair" products. See *Duplex Co. v. Deering*, 254 U. S. 443, 483, 488 (1920) (Brandeis, J., dissenting opinion). Rather, what the Union did was to follow a product of innocent manufacturers, distributed by another distributor (Certified Grocers of Southern California) as well as Servette to many neutral retailers [R. 88-89]. Permitting a boycott of these products does exactly what the Board admits the draftment of the 1959 Amendment sought to prohibit (NLRB Brief, p. 33): It spreads the labor dis-

pute throughout the community by putting pressure upon neutral parties, adversely affecting both manufacturers and sellers who become innocent victims of a labor dispute. The proviso certainly is not and was not meant to be a license to boycott the product of a producer having nothing whatsoever to do with the Union's grievance. Accordingly, therefore, Congress properly and carefully selected and approved the language which is now incorporated within the proviso.

The weakness of the Board's position is further exemplified by its reliance upon cases involving the Fair Labor Standards Act (NLRB Brief, p. 29). Such authorities cannot be used to support the Board's contention here because (1) the critical words are not the same in each statute, (2) they are not used in the same context, and (3) as the Board concedes, the Fair Labor Standards Act contains a detailed definition of "produced." Petitioner's use of *United States v. Montgomery Ward & Co.*, 150 F. 2d 369 (7th Cir. 1945) as a holding not based on express statutory definitions as the Fair Labor Standards Act cases is a contrived attempt to mislead this Court. The *Montgomery Ward* decision expressly rests on the fact that the statute before the court, the War Labor Disputes Act, directs that:

> "In making any such decision the [National War Labor] Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended; * * *" Sec. 7(a)(2), 57 U. S. Stats. 163, 166.

Rather than supporting Petitioner's argument, this case demonstrates that when Congress wanted to incorporate the definitional standards of a different statute it knew how to do it.

B. The Exception Proviso Is Not Applicable at Any Rate if the Union's Handbilling Had the Effect of Inducing Certain Store Managers to Cease Doing Business With Servette.

There is a further condition imposed by the second proviso to Section 8(b)(4) for permitting publicity other than picketing in these situations. Such activity is permitted ". . . as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, *or not to perform any services,* at the establishment of the employer engaged in such distribution; . . . ." (Emphasis added). And the plain, undisputed facts in the record show that some store managers refused to continue doing business with Servette because of the handbilling and threats thereof. Thus, another specific limitation, carefully and specifically included in the statute by Congress, necessarily must be a barrier to the Union's right to engage in such activity and to the Board's sanctioning such activity.

The evidence shows that the store manager of Kory's Market No. 6 refused to allow goods distributed by Servette to be stacked in the racks in his store after Union representatives requested him not to handle such merchandise, showed him a copy of the handbill and passed out handbills at the front entrance to the store [R. 59-60]. The manager of McDaniels Market No. 25 was also requested by agents of the Teamsters Local 848 not to handle products distributed by Servette and was shown a copy of the handbill which the Union had prepared for distribution in the Los Angeles area. The

store manager then either diminished or terminated his business with Servette [R. 63-64]. Counsel for the Union admitted that the Union was engaged in a campaign "to enlist the aid and cooperation of retail markets handling and stocking the products distributed by Servette in the Respondent's [Union's] strike against Servette, *and to promote a boycott by dealers and consumers of products.* That is all admitted. . . ." [R. 75].

In this campaign the Union was, as the undisputed evidence above shows, partly successful. To the extent that it was successful in inducing "any individual employed by any person", that is, the store managers employed by the retail food market chain stores, "not to perform any services, at the establishment of the employer engaged in such distribution", that is, to refuse to distribute, handle or resell goods distributed by Servette, the Union's acts, and specifically the handbilling, for that additional reason were outside the protection afforded by the proviso to 8(b)(4). The Board's failure to consider this fact is further indication that it has embarked on a course of ignoring the specific intent of Congress as spelled out by the carefully drawn limitations to the proviso to Section 8(b)(4).

C. The Proviso to Section 8(b)(4) Protects Only Truthful Publicity; the Handbilling in the Instant Case Was Clearly False and Misleading.

For still another reason the Union's handbilling does not fall under the protection of the proviso to Section 8(b)(4). Those handbills, addressed "To the Patrons of this Store", stated that the Union urgently requests that patrons do not buy the following products distributed by Servette: Brach's Candy, Servette Candy, Good Season Salad Dressing and Old London Products.

These handbills go on to say that "the Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers." From a reading of this handbill one must reasonably infer and patrons are led to believe that a store that sold the above named products purchased those products through Servette, when in fact in a number of instances the market involved did not buy the products named from or through Servette but from and through another distributor that had nothing to do with the labor dispute between the Union and Servette, namely, Certified Grocers of Southern California [R. 55-56; 61-62; 65; 67-69]. Consequently, because the handbills are not truthful their distribution for that further reason is not protected by the proviso.

The Board concedes that not all of the markets purchased all of the four items listed from Servette (NLRB Brief, p. 27, n. 19). Thus it is evident that the handbills were untruthful at least to the extent that they were handed out in front of stores, which stores did not purchase the products from Servette as the handbills charged. The Board argues that the handbilling was "truthful" because all of the stores where the handbilling took place did business with Servette, purchased at least one of the listed items from Servette and that in fact Servette does distribute these items. The Board, however, is engaged in a mere play upon words. No matter what attempts the Board makes to conclude the handbilling was "truthful", it cannot avoid the logic and correctness of the following syllogism: Handbills must be truthful to be protected by the proviso; the Union's handbills reasonably and logically suggested to the public that all of these markets purchased

all these products from Servette; in this regard, the handbills were clearly untruthful.

The Board argues, however, based upon its rationale in *Lohman Sales Co., supra,* that the contents of the handbilling need not be 100 percent correct. However, here in this case where the public would easily and naturally be led to believe that all of these products named in the handbilling are distributed to these stores by Servette, the falsity is a most serious one. The person that is injured is an innocent party, Certified Grocers of Southern California. It is equally clear that Congress, to the very limited extent it permitted secondary boycott activities by the proviso to Section 8(b)(4), certainly sought to protect neutral parties, especially those having nothing whatsoever to do with the labor dispute. In such circumstances the departure from truth, having such a marked and detrimental effect upon innocent persons, is reason enough to exclude such activity from the proviso.

Conclusion.

For the foregoing reasons, the judgment and order of the court below should be affirmed.

Respectfully submitted,

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Appendix.

The relevant provisions of the National Labor Relations Act, as amended in 1959 (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*), are as follows:

Sec. 2. When used in this Act—* * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

Sec. 8.* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise

dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up,

deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * * *

The relevant provisions of the National Labor Relations Act, as it existed prior to the 1959 Amendments (61 Stat. 136, 29 U. S. C. Sec. 151, *et seq.*), are as follows:

* * * * * *

Sec. 8.

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where the object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;